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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 727

ELY A. TODOROW AND LEONARD A. POTOLSKI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 396-415) is reported at 173 F. 2d 439.

JURISDICTION

The judgment of the Court of Appeals was entered February 15, 1949 (R. 416), and a petition for rehearing was denied March 18, 1949 (R. 417). The petition for a writ of certiorari was filed April 15, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether false statements in an application for surplus government property were made in a matter within the jurisdiction of the government agency selling the property, and were materially false and fraudulent.

2. Whether petitioners' convictions for causing false statements to be made in a matter within the jurisdiction of a government agency were supported by substantial evidence although they rested in large part upon the testimony of the accomplice who made the false statements on their behalf.

3. Whether the jury was properly instructed that a conviction could be based upon proof of any one of the several false statements charged in the indictment.

4. Whether evidence of petitioners' participation in a collateral offense, similar in type and closely related, was admissible to show their intent in respect of the offense charged in the indictment.

5. Whether the conduct of the trial was fair, and whether petitioners were prejudicially denied bail during a part of their trial.

STATUTE INVOLVED

Section 35(A) of the Criminal Code (18 U.S.C. [1946 ed.] 80) provided in pertinent part:[1]

> * * * whoever shall knowingly and willfully falsify or conceal or cover up by any

[1] This provision is now found in Section 1001 of Title 18, U.S.C.

trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

On November 20, 1946, an indictment was filed against petitioners in the District Court for the Southern District of California charging that they knowingly caused false statements to be made in a matter within the jurisdiction of the War Assets Administration, in violation of Section 35A of the Criminal Code, *supra*. Count IV [2] alleged that petitioners caused one Byron N. Taylor to make false and fraudulent representations in a veteran's application for surplus property to the effect that he intended to engage in the oil transportation business and was purchasing trucks for his own use and not for the purpose of resale, whereas in truth he had no such intention and was purchasing the vehicles for the sole benefit of petitioners with funds advanced by them (R. 5-6).

[2] This is the only count now involved; petitioners were acquitted on the other three counts (R. 2-5).

The evidence for the Government may be summarized as follows:

A sale of surplus trucks and trailers was held by the War Assets Administration at Port Hueneme, California, from May 20, 1946, to August 23, 1946 (R. 110, 115). The sale was restricted to veterans of World War II until June 24, but thereafter the rules of eligibility were changed from time to time so that other groups (federal agencies, state and local governmental units, and non-profit institutions) participated with the veterans. Beginning July 2, licensed automobile dealers were permitted to participate with those previously eligible on a "first-come, first-served" basis. These classes of purchasers comprised the eligible list on July 11, 1946, the date of the alleged violation. (R. 112-114.)

Throughout the period of sale a limitation was imposed on the number of vehicles which could be purchased by any eligible buyer. At first, the maximum number was one vehicle; then, on May 27, it was changed to one vehicle in each of the several categories—trucks, trailers, tractors, etc.; and finally, on June 10, an over-all limit of 25 vehicles was imposed on every eligible buyer. (R. 112-113.)

In order to participate in the sale on the basis of veteran status, an applicant was required to complete and sign a "Veteran's Application for Surplus Property," and present it with papers

showing his discharge from military service. Upon finding that such documents were in order, an official of the War Assets Administration certified on a "Purchase-Requisition" that the applicant was entitled to a veteran's preference for the purchase of a specified number of vehicles. (R. 145-146.)

Petitioner Potolski, an automobile dealer, and petitioner Todorow, an export representative, both veterans of World War II, were certified in this manner for veteran's preference, and each of them purchased 25 dump trucks on June 26, 1946. As they were informed and knew, their quotas were exhausted by these purchases, for the limit at that time was 25 units to each purchaser. (R. 126-127, 146-150, 152-154, 217-220, 267-268, 298, 367-374.) They asked the manager of the sale if they could exceed this limit, but their request was refused (R. 120).

About two weeks later, on July 10, 1946, petitioners approached Byron N. Taylor, an elevator operator at the hotel where they were staying, and, after ascertaining that he was also a veteran, offered him $20 to accompany them to Port Hueneme to buy several trucks for them (R. 175-176). The next day petitioners drove Taylor and one Lauridsen, a parking attendant at the same hotel, to Port Hueneme and instructed each of them to purchase on petitioners' behalf six 800-gallon refueler trucks (R. 178, 183). When questioned by Lauridsen

about the legality of the proposed transaction, Potolski stated that he and Todorow were in the used car business and "had bought their limit of 25 trucks apiece and therefore were using other veterans' priorities" (R. 177). Upon arrival at Port Hueneme, Taylor, accompanied by petitioners and Lauridsen, went to the certification building and filled out a "Veteran's Application for Surplus Property" in which he falsely stated that he intended to go into the business of "transporting oil" as "soon as possible" under the trade name of "Byron N. Taylor" as an individual proprietorship (R. 183, 376). In fact he had no such intention (R. 185), and supplied this information after he had asked Todorow what business he should specify and had been advised that it was immaterial and that "anything would be sufficient" (R. 184). Taylor certified that he was "not procuring the property listed in this application for the purpose of resale; and that said property is to be used in and as part of the enterprise described herein" (R. 183, 376-377). The "Purchase-Requisition" form, which he also signed, contained a similar certification that "the vehicles I wish to purchase are for my own personal use or for the maintenance of my established business, profession or agricultural activity" (R. 380).

In reliance upon these misrepresentations, War Assets' certifying officer approved Taylor for a veteran's preference for the purchase of six trucks

(R. 379). When Todorow discovered that only one vehicle was designated by serial number on the Purchase-Requisition, he directed Taylor to go back and correct the discrepancy (R. 189). Taylor was unsuccessful in effecting the change himself and Todorow returned with him to the certification building and persuaded the official to execute an additional "Purchase-Requisition" to cover the five additional trucks for which Taylor had been certified (R. 189, 379). The authorizations by the War Assets Administration for the sale of six trucks were transferred by Taylor to petitioners (R. 193), and he received from them the $20 which they had agreed to pay (R. 195).

Lauridsen, who had similarly obtained approval to purchase vehicles, objected to signing a receipt for the $15 which petitioners tendered for his services (R. 194-195, 230). He expressed suspicion of the legality of the transactions in view of the secrecy which had attended them and was told by Potolski that "we didn't want it to look like you were buying them for us" (R. 196). Potolski attempted to reassure Taylor and Lauridsen by stating that if anything was wrong with the transactions, petitioners and not they "would get it in the neck" and that, in any event, it was only "petty larceny; that nothing great would come of it" (R. 198).

Petitioners did not complete the purchase of the six trucks under Taylor's authorization. Instead,

they destroyed the contractual documents after agents of the War Assets Administration interrogated them about their use of other veterans as intermediaries in purchasing trucks (R. 232-233, 291-293).

Petitioners were convicted on the charge of having caused Taylor to make false and fraudulent representations in a matter within the jurisdiction of the War Assets Administration (R. 35), and were each sentenced to imprisonment for two years and fined $3,000 (R. 41-44). The judgments were affirmed by the Court of Appeals for the Ninth Circuit (R. 416).

ARGUMENT

After detailed and elaborate consideration of petitioners' convictions and of the many errors charged, the Court of Appeals properly concluded that there exists no ground for reversal. Petitioners bring no point of substance to this Court and there is no occasion for further review.

1. One of petitioners' contentions (Pet. 24-31) is that the Government failed to prove that false statements were made "in any matter within the jurisdiction of any department or agency of the United States," as required by Section 35A of the Criminal Code, *supra* p. 3. This contention is clearly unsound.

The War Assets Administration was created [3] to dispose of surplus property in accordance with the

[3] Executive Order 8689, effective February 1, 1946, 11 F. R. 1265.

provisions of the Surplus Property Act of 1944.[4] Congress expressly authorized the Administrator to prescribe regulations to aid veterans in the acquisition of surplus property "for their own small business, professional, or agricultural enterprise."[5] Pursuant to this mandate, the Administrator issued a comprehensive regulation[6] dealing with the disposal of surplus property to veterans and other priority claimants, and providing that, except as to property to be resold in the regular course of their business, acquisitions by veterans should be "for their own use only and not for transfer or disposition by them to others, and disposal agencies may require priority claimants so to certify."[7] The Administrator authorized disposal agencies to establish "the maximum and minimum quantities which may be acquired by any one veteran at any one time during a given period of time."[8]

Section 8302.8(a) of Regulation 2 prescribed the procedure for veterans, as follows:[9]

> A veteran desiring to acquire property set aside under § 8302.4 or to exercise his priority under § 8302.5 shall apply to any certifying office of War Assets Administration and shall

[4] 58 Stat. 765, 50 U.S.C. App. 1611-1646.
[5] Act of May 3, 1946, 60 Stat. 168, amending Section 16 of the Surplus Property Act of 1944.
[6] War Assets Administration Regulation 2, 11 F. R. 5125, effective May 3, 1946.
[7] § 8302.9(b), 11 F. R. 5127.
[8] § 8302.4(b), 11 F. R. 5126.
[9] 11 F. R. 5126.

> furnish the Administration with complete information regarding the property desired. War Assets Administration will satisfy itself through reference to the applicant's discharge papers or to other satisfactory evidence that the applicant is a veteran and that the property applied for is for his own personal use or to enable him to establish or maintain his own small business, professional, or agricultural enterprise and shall require of the applicant a supporting statement or affidavit. War Assets Administration will issue an appropriate certificate to such veteran stating that he is a veteran entitled to purchase the types and quantities of the property described therein.

It is clear, therefore, that the false statements which Taylor, at petitioners' instigation, subscribed before the War Assets Administration on forms supplied by it were made directly in a "matter within the jurisdiction" of that agency of the United States. Cf. *Sanchez* v. *United States,* 134 F. 2d 279, 283 (C.A. 1), certiorari denied *sub nom. Tapia* v. *United States,* 319 U. S. 768; *Fuller* v. *United States,* 110 F. 2d 815, 817 (C.A. 9), certiorari denied, 311 U. S. 669.

Petitioners argue, in effect, however, that since some of the details governing the sale on July 11, 1946 (particularly the designation of eligible buyers and the limitations upon the maximum quantities available to any one purchaser) were not formally set forth in a general announcement of the War Assets Administration but were pre-

scribed on the spot by the local manager of the sale, petitioners had no opportunity to know that the false statements were in a matter within the jurisdiction of the agency or that the data was material to the performance of its functions. This contention ignores the basic requirement, of which petitioners were well aware, that veterans were entitled to participate in the sale *qua* veterans only if they obtained certification for veteran's preference in conformity with a prescribed procedure. Petitioners were familiar with this procedure since they themselves had complied with it a short time previously (R. 367-368, 371-372). They knew that Taylor was an elevator operator, not a dealer in automobiles, and that he could become eligible to purchase surplus property on July 11, 1946, only if he established a veteran's preference by representing in his application that he was purchasing the vehicles for his own personal use or for his own small business, professional or agricultural enterprise. *Supra,* pp. 4-5, 9-10. In inducing Taylor to secure the necessary certification by means of false representations and turn it over to them for their use, petitioners must have understood that the requirements prescribed by the War Assets Administration would be subverted.[10]

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[10] The fact, upon which petitioners rely (Pet. 41-42), that the false information was submitted on a form originally used by the Smaller War Plants Corporation, one of the predecessors of the War Assets Administration, has no significance for, as petitioners knew, the sale was conducted at all relevant times by the latter agency, to which the representations were made.

Kraus & Bros. v. *United States,* 327 U. S. 614, with which the decision below is asserted to be in conflict (Pet. 24, 25, 29), is readily distinguishable. The *Kraus* case involved an application of the principle that administrative regulations which perform the function of defining the substance of criminal conduct must be explicit and unambiguous. Petitioners were charged, however, not with violations of any regulation of the War Assets Administration, but with having wilfully and knowingly caused false and fraudulent statements to be made in a matter within the jurisdiction of that agency, in violation of Section 35A of the Criminal Code. The trial court properly held that the written statements made by Taylor constituted matters within War Assets' jurisdiction (R. 336), and the verdict of the jury established that petitioners acted wilfully and knowingly in inducing Taylor to obtain certification as an eligible purchaser of surplus property on the basis of misrepresentations of his purpose and intention.

2. Petitioners' argument (Pet. 20-23) that the proof as to one element of the charge—the falsity of Taylor's statements—consisted solely of the testimony of Taylor, an accomplice, and was not sufficient as a matter of law, is without merit for several reasons. In the first place, as the Court of Appeals noted (R. 401), there was no dispute in the evidence that the statement that Taylor was purchasing the vehicles for his own use in establishing an oil transportation business was false.

Indeed, petitioners' own version of the facts implicitly admitted the falsity of Taylor's statements (see, e.g., R. 285-286). Consequently, there was no necessity for further corroboration. Even in strict perjury cases, the rule that the uncorroborated oath of one witness is insufficient for conviction applies only to the issue of the falsity of the testimony or statement. *Hammer* v. *United States,* 271 U. S. 620, 626; *Weiler* v. *United States,* 323 U. S. 606, 607; *Pawley* v. *United States,* 47 F. 2d 1024, 1026 (C. A. 9); 7 Wigmore, *Evidence* (3rd ed.), Sec. 2042, p. 280. And there is greater reason for applying this principle to prosecutions under Section 35A, which differs in pertinent respects from the normal perjury statute.

Moreover, there was in fact ample corroboration of Taylor's testimony. For example, petitioners' own admissions that they paid Taylor $20 (R. 230, 290) corroborated his testimony that the money was in payment for the purchase authorization procured on his false representations. Finally, even if it were true that the falsity of the statements rested solely upon the uncorroborated testimony of an accomplice, that fact would not impair the verdict. In *Caminetti* v. *United States,* 242 U. S. 470, 495, this Court approved the statement that "* * * it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to such evidence," but refused to invoke any "* * * absolute

rule of law preventing convictions on the testimony of accomplices if the juries believe them." The trial court carefully admonished the jury to receive the testimony of Taylor with caution and to weigh it with great care (R. 334-335). Petitioners were entitled to no more. They were indicted and tried for violations of the federal "false claims" act, and the considerations—growing out of the need to protect innocent witnesses from retaliation—which underlie the "uncorroborated witness" rule in ordinary perjury cases do not appear to apply to prosecutions under the statute involved here. Cf. *Weiler* v. *United States,* 323 U. S. 606, 609; opinion below, R. 401.

Petitioners' contention in essence is that the evidence was insufficient to support their convictions, but in view of the concurrent findings of the courts below on this point, no occasion is presented for an independent review of the sufficiency of the evidence by this Court. *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589-590.

3. After instructing the jury that it was not necessary for the Government to prove that the allegedly false representations were false in all the particulars charged or that petitioners caused all of them to be made, the trial court stated: "* * * If you are convinced beyond a reasonable doubt from the evidence as to each count that one or more of the statements or representations charged in

each count was false as charged, and that the defendants knowingly and wilfully caused such false statement or representation to be made to the War Assets Administration, then knowing it to be false, the Government's burden of proof in this regard has been sustained" (R. 339).

Petitioners complain that this instruction impaired the requirement of unanimity for the jury's verdict. Their contention would have merit only if the quoted instruction could be construed as suggesting that some members of the jury, less than twelve, might find a particular statement false, while the remaining members might find another statement false, and that the combination of the two groups would suffice to meet the requirement of unanimity. But throughout the charge to the jury the court used the pronoun "you" in its collective sense, and the phrase, "If you are convinced beyond a reasonable doubt," in the quoted part, coupled with the subsequent instruction that "In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous" (R. 342), clearly admonished the jury that all members must agree that a particular one of the representations was false and that petitioners knowingly and wilfully caused it to be made.

In *Warszower* v. *United States,* 312 U. S. 342, 345, this Court said in a similar context: "As the trial court instructed the jury it might convict if any one of the statements charged in the indictment to be false were found false, it is necessary

before affirmance is justified to decide whether there was adequate evidence to support the charge of falsity as to each of the statements." Cf. *United States* v. *Mascuch,* 111 F. 2d 602 (C.A. 2), certiorari denied, 311 U. S. 650; *Levine* v. *United States,* 79 F. 2d 364, 369 (C.A. 9). In the instant case, as the Court of Appeals stated, "* * * There was substantial evidence in the record that all of the representations, made by Taylor, were false, as alleged in the indictment, and that appellants caused all of them to be made. If it be assumed, therefore, that the jury based its verdict on only one false representation, and it does not matter which one, there was substantial evidence to support the verdict" (R. 406).

4. Evidence was admitted showing that petitioners induced another veteran, Lauridsen, to accompany them to the sale to purchase trucks on their behalf, and petitioners contend that this constitutes reversible error (Pet. 45). But the trial court carefully instructed the jury that this evidence was received not to prove any of the transactions alleged in the indictment, but solely "for the purpose of determining the intent with which the defendants acted in doing the acts charged in any count of the indictment, if you find from the evidence that they did those acts, but you may consider it for no other purpose" (R. 160-161, 165-166, 411-2). Safeguarded by this precautionary instruction, the evidence of the closely-interwoven collateral offense was clearly admissible to prove

petitioners' intent in committing the offense charged. *Williamson* v. *United States,* 207 U.S. 425, 450-451; *Jones* v. *United States,* 258 U.S. 40, 48.

5. Petitioners also contend (Pet. 10, 32-37) that they were deprived of a fair trial because of prejudice on the part of the trial judge. They point to his denial of a request for a continuance of the trial; his action in remanding petitioners to the custody of the marshal during the first part of the trial; his admonitions to counsel during examination of witnesses; and his refusal to grant bail pending appeal. The Court of Appeals stated that, after carefully examining the record in the light of these contentions, it had concluded that the trial judge had not been biased and that petitioners had been given a fair trial with full opportunity to present their defenses (R. 413-414). And the instances of asserted "prejudicial misconduct" during the trial which petitioners specifically cite (Pet. 34-5) certainly do not bear out their allegation.

Petitioners were entitled to bail from the date of their arrest, November 21, 1946, to April 24, 1947, when the trial began (Rule 46, F.R. Crim. P.). They were at liberty on bail during that period. But as soon as the trial commenced the court had discretion to order them into custody to assure their continued presence during the trial. "It is an inherent power of the court and one to be exercised in its discretion the same as is the discre-

tionary power to keep the jury together in the custody of the marshal during the criminal trial." *United States* v. *Rice,* 192 Fed. 720, 721 (C.C.S.D. N.Y.) In view of the irresponsibility shown by petitioners in failing to be in court on the scheduled trial date and their ostensible attempts to delay the trial, the trial judge cannot be said to have acted arbitrarily in remanding them to custody and refusing a continuance. The indictment had been returned more than five months previously, and arraignment and plea had been deferred to the date of trial to accommodate petitioners. They were notified of the trial date, April 22, 1946, more than a month in advance (R. 50-51), and they stated they would be in court on that day (R. 92, 93). Nevertheless, Todorow did not leave New York for California until the evening of April 21 (R. 82) and, although Potolski allegedly had been under medical care for more than a year (R. 65), it was not until the morning of April 22 that his counsel presented a medical excuse for his absence on that day. When this excuse was rejected, Potolski flew from New York to Los Angeles the night of April 22 (R. 82). These circumstances offered strong support for the trial judge's suspicions that petitioners were resorting to dilatory tactics, and that expedition of the trial would be served by holding them in custody.

Whether or not the trial judge was justified in remanding petitioners to custody, however, it does not appear that they were prejudiced by his action.

Although local counsel who represented petitioners at the trial did not enter the case until April 19, 1947, they had previously been represented by other counsel in the East (R. 48, 93-94). Moreover, the trial judge afforded counsel full opportunity to confer with petitioners while they were in custody (R. 134).[11] Petitioners' situation did not differ from that which normally prevails when defendants who cannot raise bail remain in custody during trial.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
HAROLD D. COHEN,
Attorneys.

MAY 1949.

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[11] It does not appear from the record exactly how long petitioners remained in custody, but on April 28, 1947, the day before the Government rested its case, Todorow, and presumably Potolski also, were at large (R. 295-296).

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